Supreme Court, U.S.
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No. 09A353 09-663

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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC.,

Appellant-Petitioner,

-against-

VERIZON NEW YORK INC.,

Appellee-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[CORRECTED] PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Best Payphones, Inc. filed an appeal of the disposition by the Bankruptcy Court of the Southern District of New York (the "Bankruptcy Court"), of a claim by Respondent Verizon New York Inc. in Petitioner's bankruptcy proceeding, but that appeal was dismissed by the United States District Court for the Southern District of New York (the "District Court") on the ground that Petitioner had failed to file its appellate brief on a timely basis. The Second Circuit affirmed the dismissal.

1. Must a district court consider certain factors, e.g., whether the appellant exhibited bad faith, negligence, or indifference, and less-severe sanctions under Rule 8001(a) of the Federal Rules of Bankruptcy Procedure ("Rules") before dismissing an appeal for failure to timely file an appellant's brief, as the Third, Fourth, Sixth, Ninth, and Eleventh Circuits have held, or is dismissal compelled simply because of such failure, as the Second Circuit found in this Case?

2. Is the provision of Rule 8007(b) that "the clerk of the district court" must "give notice promptly to all parties . . . of the date on which the appeal was docketed" mandatory as the Third and Fourth Circuits have found, or is it not "rigid and unflexible" so that a phone call from a judge's law clerk more than fifteen days (now fourteen days) after the docketing of the appeal – which cannot be considered "prompt[ ]" because the time period to satisfy the obligation that the notice normally triggers has already elapsed – that is neither recorded nor memorialized by the District

Court, suffice, as the Second Circuit found (without any evidence that the law clerk mentioned the date of the docketing of the appeal or even intended that the phone call was to be "notice" under Rule 8007(b))?

3. If notice of docketing of an appeal from a bankruptcy court is sent after the 15-day period (14 days, effective Dec. 1, 2009), measured from the date of docketing, prescribed in Rule 8009(a)(1) in which to file a brief, must an appellant file its brief fifteen days from the date that said notice is sent notwithstanding that there is no basis in the Rules to support such a position?

CORPORATE DISCLOSURE STATEMENT

Pursuant to rule 29.6 of this Court, Petitioner Best Payphones, Inc. states that it is a privately-held corporation and no publicly-held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Best Payphones, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On May 21, 2009, the Second Circuit issued a summary order in this case affirming the dismissal of Best's appeal. It is reproduced at App. A and appears at 331 Fed. Appx. 25; 2009 U.S. App. LEXIS 10805. Best's Petition to the Court of Appeals for the Second Circuit for Rehearing was denied on July 31, 2009 and is reproduced at App. D.

The opinion of the District Court, S.D.N.Y., granting Verizon's motion to dismiss the appeal, dated June 2, 2008 is reproduced at App. B, and its decision denying Best's motion to reconsider dated July 21, 2008 is reproduced at App. C and appears at 2008 U.S. Dist. LEXIS 108874.

JURISDICTION

The Second Circuit issued its opinion on May 21, 2009, and its opinion and judgment were entered on May 21, 2009. (*See* App. A.) It denied Petitioner's motion for the panel's rehearing or for a rehearing *en banc* by order entered on July 31, 2009. (App. D.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Federal Rule of Bankruptcy Procedure 8001(a)(1) reads:

> Rule 8001. Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals
>
> (a) Appeal as of right; how taken.
>
> An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of

copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

Federal Rule of Bankruptcy Procedure 8006 reads:

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal,

the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Federal Rule of Bankruptcy Procedure 8007(b) reads:

(b) Duty of clerk to transmit copy of record; docketing of appeal.

When the record is complete for purposes of appeal, the clerk shall transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket and give notice promptly to all parties to

> the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel shall notify the appellant and, if the appellant fails to provide the copies, the clerk shall prepare the copies at the expense of the appellant.

Federal Rule of Bankruptcy Procedure 8009(a)(1)[1] reads:

> (a) Briefs.
>
> Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:
>
> > (1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

Federal Rule of Bankruptcy Procedure 9006(b)

---

[1] Effective December 1, 2009, this provision was amended, *inter alia*, to change "15 days" to "14 days."

reads:

> (b) Enlargement.
>
> (1) In general.
>
> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.
>
> (2) Enlargement not permitted.
>
> The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.
>
> (3) Enlargement governed by other rules.
>
> The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033, only to the extent and under the

conditions stated in those rules. In addition, the court may enlarge the time to file the statement required under Rule 1007(b)(7), and to file schedules and statements in a small business case under § 1116(3) of the Code, only to the extent and under the conditions stated in Rule 1007(c).

INTRODUCTION

When a lawyer reaches for her copy of the Federal Rules of Bankruptcy Procedure, or of any other "Federal Rules" for that matter, she should not be thrust into a world in which the words mean whatever a judge chooses to have them mean, especially with respect to when something must be done by a date-certain or be forever lost. Here, the Second Circuit adopted a rule that puts it into conflict with numerous other Circuits on what should be an unambiguous question, when must an appellant's brief be filed when the clerk of the District Court fails to send the requisite notice?

The Circuit-conflicts arise in two respects.

First, what standard applies – Rule 8001(a)(1), which is specific to appeals, or Rule 9006, which is the general late-action catch-all – to a failure to file an appellate brief on time?

Second, what standard applies when there is a failure by *the clerk* of the District Court in providing notice that an appeal has been "docketed" to determine just when an appellant's brief is due.

Accordingly, *certiorari* is sought because the Second Circuit's decision puts it in conflict on an important issues with earlier decisions of numerous other courts of appeal. Sup. Ct. Rule 10(a).

STATEMENT OF THE CASE

I. Proceedings Below

1. Background

On November 15, 2007, Best filed a notice of appeal in the District Court from a final judgment of the Bankruptcy Court. On February 3, 2008, Best's substitute counsel, George M. Gilmer, appeared in the Bankruptcy Court. On March 14, 2008, the Clerk of the District Court ("Clerk") docketed Best's appeal and on March 18, 2008 "[m]ailed notice to [the] attorney(s) of record[ ]" of the docketing of the appeal ("Notice of Docketing") to Best's former counsel at an *invalid address* – neither the District Court nor the Second Circuit found that the Clerk sent properly the Notice of Docketing to either to Best's former attorney or Mr. Gilmer.

On Monday, April 21, 2008, *thirty-eight days after the appeal was docketed*, a law clerk for the District Judge called ("Chamber's Call") Mr. Gilmer "to inquire what Best's intentions were regarding th[e] appeal."[2] This Call was neither recorded nor memorialized by the District Court in any manner, and there is no evidence that the law clerk advised Mr. Gilmer of the date on which the appeal was docketed or that the District Court itself considered the Chamber's Call to

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[2] This is quoted from the April 23, 2008, letter that Best sent to the District Court Judge.

be notice pursuant to Rule 8007(b).

On April 23, 2008, after contacting Verizon's attorney seeking his consent to a briefing schedule that Best intended to propose to the District Judge, Mr. Gilmer wrote to the District Judge to advise him that opposing counsel had been contacted regarding a suggested briefing schedule of thirty days for each side to file their briefs and two weeks for Best to file a reply. Mr. Gilmer also advised the District Judge in his letter that opposing counsel said he would consult with his client and respond the following week as he had been out of his office.

On April 25, 2008, four days after the Chamber's Call, notwithstanding the statement of Verizon's counsel that he was out of his office and would respond the following week, and without responding to Mr. Gilmer's request, Verizon filed a motion to dismiss the appeal for failure to file a brief in accordance with Rule 8009(a)(1). According to Verizon, Best had until March 28 [sic], 2008, fifteen days after the docketing of the appeal, to file its brief. This shows, of course, that Verizon itself did not consider the Chamber's Call to be notice pursuant to Rule 8007(b) and that Best was obligated to file a brief under Rule 8009(a)(1) within fifteen days of the Chamber's Call because, as mentioned above, Verizon filed its motion just four days after the Chamber's Call.

Furthermore, as was the case with the Chamber's Call, the District Judge made no entry on the District Court's docket regarding Mr. Gilmer's letter, which

had been faxed to the Judge's chambers. (The local rules of the District Court forbid a party from filing such a letter.)

In opposing Verizon's motion, Best argued that the fifteen-day period prescribed in Rule 8009(a)(1) never began to run because neither Best's attorney of record nor its former attorney was properly sent the Notice of Docketing. Best argued that there was no showing of bad faith, negligence, or indifference on its part with respect to its non-filing of its brief as required by Rule 8001(a). So, Best argued, the appeal should not be dismissed for failure to file an appellant's brief because the obligation to file a brief was never triggered, and in any event under Rule 8001(a) the appeal should not have been dismissed.

2. The District Court's Decision

The District Court, (App. B), granted Verizon's motion to dismiss without finding that the Notice of Docketing was mailed from the Clerk's Office to, or received by, either Mr. Gilmer or Best's former attorney. The District Court hinged its dismissal on the *sua sponte* finding that the Chamber's Call constituted notice pursuant to Rule 8007(b) notwithstanding, *inter alia*, that the Chambers Call occurred thirty-eight days after docketing, twenty-three days *after* the brief would have been due pursuant to Rule 8009(a)(1) if in fact the District Court Clerk mailed the Notice of Docketing to Mr. Gilmer.

In dismissing the appeal the District Court wrote,

"the fifteen-day period would have begun to run after Best's new counsel was notified of the docketing of the appeal – which occurred more than a month ago." (*Infra* at 9a.) So in addition to finding the Chamber's Call, which was neither recorded nor memorialized by the District Court, constituted notice pursuant to Rule 8007(b) – which it logically could not be considered to be because a notice sent on April 21, 2008, cannot trigger an obligation to file a brief on March 29, 2008, i.e., the deadline set pursuant to Rule 8009(a)(1) if the notice was "prompt[ ]" – the District Court interpreted Rule 8009(a)(1) to require that a brief be filed fifteen days after notice is sent, regardless of the fact that said Rule measures the fifteen-day period in which to file a brief from the date of docketing and does not address the circumstance of notice being sent more than fifteen days after docketing. This interpretation was untethered to anything in the Rule itself.

3. Best Moves for Reconsideration

In a motion for reconsideration, Best showed that the District Court overlooked that Rule 8007(b) required that notice be sent to Mr. Gilmer from "the clerk of the district court," which never occurred, and as a result the fifteen-day period prescribed by Rule 8009(a)(1) in which to file a brief never began. Best also pointed out that as a matter of law an appeal should not be dismissed in the absence of bad faith, negligence, or indifference, under Rule 8001(a)(1).

Best also showed that the District Court's finding that Best was responsible for delay was not supported

by the record and that it had not repeatedly missed deadlines. It identified documents in the record that supported a finding that Verizon was responsible for delay.

4. The District Court's Decision on Best's Motion for Reconsideration

In essence, the District Court, (App. C), found that the Chamber's Call (neither recorded nor memorialized and that occurred thirty-eight days after the docketing of the appeal) was equivalent to a notice mailed by the clerk of the district court in compliance with Rule 8007(b) and that Rule 8009(a)(1) is not "rigid and unflexible," (*infra* at 14a), i.e., a notice of docketing of an appeal automatically triggers a fifteen-day period to file an appellant's brief even if it is sent more than fifteen days after docketing.

5. Best's Appeal to the Second Circuit

In its appeal to the Second Circuit, Best made the same arguments as it made in the District Court: 1) the obligation to file an appellant's brief was never triggered as the Chamber's Call was not equivalent to mandatory notice that the Clerk must send pursuant to Rule 8007(b); 2) even if the District Court's interpretation of 8007(b) were correct, i.e., the Chamber's Call was equivalent to the written notice that is sent by the Clerk, the interpretation of Rules 8007(b) and 8009(a)(1) in combination would result in the impossible because a brief could not be due on March 29, 2008, as a result of a notice sent on April 21,

2008; 3) there is no basis in the Rules to support the position that Notice of Docketing sent more than fifteen days after docketing triggers an obligation to file a brief in fifteen days from the date that the Notice of Docketing is sent; and 4) consideration of the circumstances in conjunction with Rule 8001(a) prevents dismissal of appeal.

6. The Decision of the Second Circuit

Initially, it must be noted that the Second Circuit, (App. A), did not address Best's argument that even if an obligation to file a brief was triggered, which it was not, and Best did in fact fail to comply with Rule 8009(a)(1), which it did not do, the appeal should not have been dismissed because there was an absence of bad faith, negligence, or indifference, i.e., under Rule 8001 (a), Best's appeal should not have been dismissed even if it missed a deadline to file a brief.

In addition to not addressing Best's Rule 8001(a) argument, the Second Circuit found that the Chamber's Call, which, as pointed out, was neither recorded nor memorialized by the District Court and occurred thirty-eight days after the docketing of the appeal, was "actual notice" and that it did not matter that it occurred more than fifteen days after docketing, which would have been the deadline to file a brief under Rule 8009(a)(1) if in fact proper notice was sent. In other words, notwithstanding that there is no basis in the Rules for a brief to be due fifteen days from a notice of docketing of an appeal when the notice is sent more than fifteen days from the docketing of the appeal, the

Second Circuit found that Best missed the deadline to file its appellant's brief because the Chamber's Call that occurred thirty-eight days after the docketing of the appeal triggered such an obligation, which Verizon itself did not argue to the District Court.

It also must be noted that the Second Circuit distinguished Best's arguments from findings of a prior panel's decision, *In re Enron Corp.*, 475 F.3d 131 (2d Cir. 2007), that Best cited. In *Enron*, there was nothing equivalent to the Chamber's Call and the appellant was *pro se*. The Second Circuit said, "Best relied on an *overly literal reading* of our holding in *In re Enron Corp.*" (*Infra,* at 4a (emphasis added).)

7. Petitions for Rehearing and Rehearing En Banc

Best filed Petitions for Rehearing and Rehearing En Banc and both were denied. (App. D.)

REASONS FOR GRANTING THE PETITION

This Petition is of exceptional importance and should be granted because resolution of the splits among the Circuits on the issues raised herein will have ramifications on: 1) all bankruptcy appeals from all bankruptcy courts with regard to when the obligation to file an appellant's brief arises, e.g., what is proper notice under Rule 8007(b) and what is an appellant's obligation if notice is sent more than, by virtue of the amendment to Rule 8009(a)(1), fourteen days after docketing (instead of the fifteen-day period provided

for in that Rule in this case); 2) all motions to accept a non-jurisdictional late filing in bankruptcy appeals, including late filings under Rule 8006, i.e., does Rule 8001(a) apply or Rule 9006(b)(1) apply to motions to accept late filings – motions for late filings related to Rule 8009(a)(1) will undoubtedly rise as a result of the shortening of the time to file an appellant's brief; and 3) what criteria should be used to decide motions related to Rule 8001(a).

These issues, of course, are likely to arise more often in the future than they have to date given the increasing rate of bankruptcy filings, increasing at an annual rate of more than thirty-percent the last two fiscal years. http://www.uscourts.gov/bnkrpctystats/statistics.htm#calendar, (*last visited* November 30, 2009).

I. Although numerous Circuits have held that Rule 8001(a) applies to motions to dismiss for non-jurisdictional late filings, the Second Circuit has held otherwise

1. Part VIII of the Federal Rules of Bankruptcy Procedure applies to "Appeals to District Court" and the first part of the first rule of that Part reads, "[a]n appellant's failure to take *any* step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground for such action as the district court . . . deems appropriate." Fed. R. Bankr. P. 8001(a)(1) (emph. added). Not surprisingly, then, courts have generally applied the standards developed under that rule in deciding whether to allow an appeal

to proceed notwithstanding a failure to file a document (other than a notice of appeal) required. For example, in *Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.)* the Fourth Circuit held that for late, non-jurisdictional filings in bankruptcy court, in that case a statement of issues on appeal, Rule 8001(a)(1) required a district court, before dismissing the appeal, to:

> (1) make a finding of bad faith or negligence; (2) give the appellant notice or an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; or (4) indicate that it considered the impact of the sanction and available alternatives.

45 F.3d 70, 72 (4th Cir. 1995). *See, also, In re Winner Corp.*, 632 F.2d 658 (6th Cir. 1980) (same), *In re Beverly Manufacturing Corp.*, 778 F.2d 666, 667 (11th Cir. 1985)(following *In re Winner*).

The Fourth Circuit recognized that Rule 9006(b)(1), from Part IX of the Bankruptcy Rules, "General Provisions," might also apply, but rejected the idea, observing that "Rule 9006 applies to all bankruptcy proceedings. Rule 8001 applies only to appeals." *Id.* at 71.

By contrast, the Second Circuit has done the opposite, requiring a showing of "excusable neglect" before allowing an appeal to proceed. This was the holding in *In re Lynch*. 430 F.3d 600, 605 (2d Cir. 2005). In *In re Harris*, then-Judge Sotomayor recognized the conflict:

> We recognize that some of the cases noted above (as well as later in this opinion) appear to conflict with our decision in *Lynch* in their determination that the untimely filing of a designation or statement under Rule 8006 should be governed not by the "excusable neglect" standard of Rule 9006 but by the terms of Rule 8001. *Compare Lynch*, 430 F.3d at 605 with *Resolution Trust Corp.*, 45 F.3d at 73 (analyzing failure to file timely statement of issues under Rule 8001); *In re Fitzsimmons*, 920 F.2d [1468] at 1474 [(9th Cir. 1990)] (same); *In re Comer*, 716 F.2d [168] at 177 [(3d Cir. 1983)] (affirming district court's refusal to dismiss for failure to file timely designation of record and statement of issues under the precursor to Rule 8006); *In re Winner*, 632 F.2d at 661 [(6th Cir.)] (same). These cases, nevertheless, enumerate general standards for courts to use in determining when a dismissal under Rule 8001 is appropriate. *While our specific holding in Lynch appears not to comport with the great majority of our sister courts*, we need not address the potential conflict because, as explained above, this case does not involve the failure to file a timely submission but failure to file a specific component of what the district court deemed Rule 8006 required. Rule 9006 and *Lynch*'s holding are therefore not at issue.
>
> 464 F.3d 263, 271 n.6 (2d Cir. 2006) (Sotomayor, J.)

(emphasis added).[3] As Rule 8006 requires the filing of certain items, so does Rule 8009, so the observations in *In re Harris* apply with equal force to Best's case.

And with respect to Rule 8009, in *In re Beverly*, the Eleventh Circuit joined the Sixth in requiring a finding of "bad faith, negligence or indifference" before dismissal for a failure to file a brief under Rule 8009(a)(1) is appropriate. 778 F.2d at 667 (relying on *In re Winner Corp.*, 632 F.2d 658)).

2. This case presents to this Court the issue that then-Judge Sotomayor deferred in *In re Harris*: does Rule 8001(a)(1) govern an untimely filing of something mandated by Part VIII of the Bankruptcy Rules or is it the catch-all Rule 9006? Is the flexibility in how other circuits treat late appeal filings – except for a notice of appeal – appropriate or is the high-bar imposed by Rule 9006 adopted by *In re Lynch* what must be cleared?

Thus, there is a plain conflict among circuits. The Third (*Comer*), Fourth (*RTC*), Sixth (*Winner*), Ninth (*Fitzsimmons*), and Eleventh (*Beverly*) Circuits have applied Rule 8001. The Second has applied Rule 9006.

The D.C., Fifth, and Seventh Circuits have been more flexible than has the Second. The D.C. Circuit held in *English-Speaking Union v. Johnson* that "[w]e

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[3] Then-Judge Sotomayer proceeded to discuss the manner in which other Circuits have applied the flexible test of Rule 8001(a).

think that district courts can achieve the proper balance between trying cases on the merits and managing their dockets efficiently by considering the circumstances before them and explaining why it is in the interest of justice to dismiss rather than to proceed to the merits." 353 F.3d 1013, 1021-22 (D.C. Cir. 2004).

The Fifth Circuit did much the same in *Zer-Ilan v. Frankford (In re CPDC Inc.)*, another case involving the failure to file a statement of issues on appeal, writing,

> in determining whether dismissal is an appropriate sanction, a district court should keep in mind that some infractions of the rules of bankruptcy procedure are harmless and do not merit dismissal; . . . and that the primary goal of courts as enforcers of the bankruptcy rules should be to ensure the swift and efficient resolution of disputes pertaining to the distribution of the bankruptcy estate.

221 F.3d 693, 699-700 (5th Cir. 2000).

And in *In re Scheri*, the Seventh Circuit reversed a dismissal, notwithstanding its inherently discretionary nature, when the district court had failed to explain why this "most severe" sanction was appropriate given the history of the case. 51 F.3d 71, 75 (7th Cir. 1995).

But in the Second Circuit, and contrary to the D.C. and Fifth Circuits in this respect, as held by *In re Lynch*, "where the appeal is precluded without the

untimely action, there is no scope for an independent analysis under Rule 8001(a)." 430 F.3d at 605.

In the end, in *In re Harris* (which discusses these cases in detail), the Second Circuit endorsed a flexible test *but only in the context of a partial failure to make a required filing*. In this case, although Best argued under Rule 8001(a) that it was an abuse of discretion to dismiss its case because it did not exhibit bad faith, negligence, or delay, the Second Circuit did not address the argument. In this case the Second Circuit did not do an analysis under either 8001(a) or 9006(b)(1) and in *In re Lynch*, it held that 9006(b)(1) applied to the contrary.

This conflict is an important one and should be resolved by this Court.

1. **The Second Circuit and District Court failed to consider the factors of Rule 8001(a) in considering the motion to dismiss Best's appeal.**

With regard to Petitioner's appeal to the Second Circuit, the court failed to address the argument that Rule 8001(a) requires that bad faith, negligence, or indifference must be found before a dismissal for failure to file an appellant brief would be appropriate, and therefore erred by failing to properly exercise the discretion granted by Rule 8001(a). *See In re Zer-Ilan*, 221 F.3d at 699. *See also In re Winner Corp.*, 632 F.2d 658 at 660-61 (the late filing of a required document does not justify the dismissal of the appeal absent a showing of bad faith, negligence, or indifference). The

Second Circuit also erred in allowing the dismissal of Best's appeal absent a finding of consistent dilatory conduct by Petitioner or the complete failure to take any steps other than the mere filing of a notice of appeal (as required by *In re Beverly Manufacturing Corp.*, 778 F.2d at 667), neither of which occurred before Petitioner's case was dismissed.

II. Because the "clerk of the district court" did not send notice of the docketing of Best's appeal to Best properly, the District Court erred when it dismissed the appeal for Best's failure to file its brief.

1. The Bankruptcy Rules' scheme for taking appeals to a district court is straight-forward. Rule 8007(b), entitled, "(b) Duty of clerk to transmit copy of record; docketing of appeal," reads:

> When the record is complete for purposes of appeal, the [bankruptcy court] clerk shall transmit a copy thereof forthwith to the clerk of the district court .... *On receipt of the transmission the clerk of the district court . . . shall enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed.*

Fed. R. Bankr. P. 8007(b) (emph. added) (references to bankruptcy appellate panel omitted).

Rule 8009 (a)(1) in turn reads, "The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket *pursuant to Rule 8007.*" Fed. R. Bankr. P. 8009(a)(1) (emph. added).

In *In re Jewelcor Inc.*, Judge Aldisert wrote,

> the rule starts the time period with the twin actions of the district court clerk prescribed in

> Rule 8007: (1) "[T]he clerk . . . shall enter the appeal in the docket and [(2)] give notice promptly to all parties." With respect to notice, the advisory committee tracked Rule 12(b) of the Federal Rules of Appellate Procedure: "Upon receipt of the record . . . the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed." The notice requirement is an integral part of limitations periods found throughout our rules of procedure and the bankruptcy code. Rule 8007 is no exception. As we will not condone an appellant's dilatory tactics in filing an appeal, we will not hold an appellant accountable for a third party's oversight that was beyond the appellant's knowledge and control.

11 F.3d 394, 398 (3d Cir. 1993) (footnote omitted) (brackets and ellipses in original).[4]

The "third party" referred to was the district court clerk, who failed in that case to send the requisite notice. It was not enough that a letter had been sent by the "bankruptcy court clerk notifying the parties that the record on appeal had been transmitted to the district court for docketing," *id.*, at 397, since "[w]ithout notice from the clerk of the district court, an

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[4] Judge Aldisert was the "chairman of the Advisory Committee on Bankruptcy Rules at the time the relevant rules were drafted and subsequently enacted." 11 F.3d at 398 n.1.

appellant cannot be certain of the precise date on which the appeal was docketed. Given the extremely restricted time period in which the appellant is to file the brief, notice to the parties from the district court clerk is critical," *id.*, at 398. Thus the court set out a straight-forward rule:

> The 15-day period is triggered not by the letter of transmittal from the bankruptcy court clerk, but the docketing and sending of notice by the district court clerk. Without notice from the clerk of the district court, an appellant cannot be certain of the precise date on which the appeal was docketed. Given the extremely restricted time period in which the appellant is to file the brief, notice to the parties from the district court clerk is critical.

11 F.3d at 398.

In *In re Weiss*, the Fourth Circuit, relying on *In re Jewelcor*, also held that the fifteen-day clock of rule 8009 was triggered by the district court clerk's mailing of a "briefing letter," which in that case "stated that the appeal had been docketed and that her brief was due within fifteen days of the letter's date." 111 F.3d 1159, 1172 (4th Cir. 1997). When the appellant claimed that she never received the letter, the court was able to locate proof that it had been mailed, when it had been mailed, to where and whom it had been mailed, and what it said. Although the court reversed the dismissal of the appeal, it affirmed as to whether the appeal was untimely under rule 8009, applying the

presumption-of-receipt of a letter "properly addressed, stamped and mailed." *Id.* at 1172-73.

The Second Circuit ignored this. It expressly found notice provided "by court personnel" (although it does not say who) suffices. The District Court dismissed Best's appeal as untimely. On appeal to the Second Circuit, Best raised the question of the proper reading of Rules 8007 and 8009. In its case, formal notice of the "date on which the appeal was docketed" was never properly sent by the district-court clerk to Best. The district-court clerk sent notice to an incorrect address (one never supplied by counsel) to a lawyer who was no longer counsel-of-record and nothing was sent to Best's counsel-of-record at the address he had on record with the Bankruptcy Court. The District Judge's law clerk telephoned Best's actual counsel but did not advise him that the call constituted Rule 8007 notice and considered it of such little moment that no record of the call was made in the docket. But rather than the reading given by the Third Circuit in *In re Jewelcor* and the Fourth Circuit in *In re Weiss*, the Second Circuit endorsed the District Court's convoluted (and wrong) construct that allowed it to dismiss Best's appeal for untimeliness, never reaching the merits.

2. Alternatively, the Second Circuit creates an untenable scenario: notice sent over fifteen days *after* docketing is enough even though by that day the appellant was already time-barred because the time for filing her brief – fifteen days from docketing – had come and gone.

The result is that attorneys are left in doubt as to such a fundamental matter as what constitutes "notice . . . of the date on which the appeal was docketed." Is a call from a district judge's law clerk – not from "the clerk of the district court" – enough even if the law clerk never says her call is meant to be rule 8007 "notice," the call itself is so inconsequential as to not be recorded in the District Court's docket, and the call itself was made over fifteen days after the appeal was docketed?[5] This would never suffice under the proper approach of the Third Circuit in *In re Jewelcor* where actual written notice from the wrong clerk was not enough. Nor does it square with the Fourth Circuit's treatment in *In re Weiss*, where there was written evidence of just what was said by the district-court clerk in the docketing letter written to the appellant. Here, "notice" was at most merely a phone call from a law clerk.

Accordingly, *certiorari* to the Second Circuit will be sought based upon this circuit-conflict under rule 10(a) of this Court as well as because it raises the important issue of what constitutes notice.

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[5] The record here reflects that Best's counsel did act diligently upon receiving that call. He was, however, blindsided by the District Court's later characterization of this call as constituting the requisite 8007 notice. In this the courts below are also at odds with the Third Circuit in *In re Jewelcor*, which held that any dilatoriness on the part of a party – and there was none in this case as to Best – may only be addressed upon consideration of the merits of an appeal and may not be used to close the door on an appeal in the first place. 11 F.3d at 398-99.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph P. Garland
Counsel of Record
LAW OFFICE OF
JOSEPH P. GARLAND
2 William Street, Suite 304
White Plains, NY 10601
(914) 912-7858
Counsel for Petitioner

December 2, 2009

APPENDIX A: SUMMARY ORDER OF SECOND CIRCUIT DATED MAY 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the twenty-first day of May, two thousand and nine.

PRESENT:
WILFRED FEINBERG,
JOSÉ A. CABRANES,
SONIA SOTOMAYOR,
Circuit Judges.

IN RE: BEST PAYPHONES, INC.,

Debtor,

BEST PAYPHONES, INC,

Appellant,

-v.-

VERIZON NEW YORK INC.,

Appellee.

APPENDIX A

No. 08-4046-bk

[May 21, 2009]

[SUMMARY ORDER]

331 Fed. Appx. 25; 2009 U.S. App. LEXIS 10805

FOR APPELLANT: GEORGE M. GILMER, Brooklyn, NY.

FOR APPELLEE: DARRYL S. LADDIN, Arnall Golden Gregory LLP, Atlanta, GA.

Appeal from a judgment of the United States District Court for the Southern District of New York (Gerard E. Lynch, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be AFFIRMED and the motion of Appellee for damages and costs be DENIED.

Appellant Best PayPhone, Inc. appeals from a judgment of the District Court dismissing its appeal of an order of the U.S. Bankruptcy Court for the Southern District of New York. The District Court dismissed the appeal pursuant to Rule 8009(a)(1) of the Federal Rules of Bankruptcy Procedure because of Best's failure to file a timely brief. Appellee Verizon New York, Inc., has moved for damages and costs pursuant to Rule 38 of the Federal Rules of Appellate

Procedure on the ground that this appeal is frivolous. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

We review for abuse of discretion a district court's decision to dismiss a bankruptcy appeal for failure to comply with Rule 8009(a)(1), which requires a bankruptcy appellant to "serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007." *See In re Enron Corp.*, 475 F.3d 131, 133 (2d Cir. 2007). Best argues that its failure to file a brief should be excused because (1) notice was not mailed to Best's counsel of record and (2) the oral notice provided by a law clerk of the District Judge did not constitute adequate notice that the appeal had been docketed. These arguments are without merit. As the District Court explained, "[o]n Best's theory, even now, more than eight months after Best filed its notice of appeal, more than four months after that appeal was docketed, and three months after receiving actual notice from court personnel, Best's fifteen-day clock still has not even begun." *In re Best Payphones, Inc.*, No. 08 Civ. 2553 (S.D.N.Y. July 21, 2008). The record shows unambiguously that Best had actual notice that the appeal had been docketed but nevertheless failed to file a brief as required by Rule 8009(a)(1).

Our holding in *In re Enron Corporation* is not to the contrary. There, we rejected a construction of the rule under which "the docketing of the appeal was itself sufficient to start the fifteen-day clock," and we held that "the fifteen days given to an appellant to file a brief only begins to run once the appeal is docketed and notice has been sent." 475 F.3d at 134-35. We

rejected the argument that actual knowledge – by a *pro se* litigant – satisfied the notice requirement, but there was no finding in that case that the knowledge had been acquired by notice from the court. Here, the appeal was docketed and notice was provided to Best by court personnel; neither the rule nor our precedents require more. We therefore see no error, much less abuse of discretion, in the decision of the District Court to dismiss the appeal.

Although we see no merit in Best's argument, that does not make this appeal frivolous within the meaning of Rule 38 of the Federal Rules of Appellate Procedure, which authorizes the award of damages and costs to an appellee having to defend against a frivolous appeal. "The standard for the imposition of such a penalty is where the appeal taken is found to be groundless, without foundation, and without merit . . ." *In re Drexel Burnham Lambert Group*, 995 F.2d 1138, 1147 (2d Cir. 1993). That is not the case here. Although Best relied on an overly literal reading of our holding in *In re Enron Corp.* that was lacking merit, it was not devoid of any foundation in law. *See id.* ("Sanctions may be imposed when one party proceeds with an argument totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence." (internal quotation marks omitted)). Because Best's argument is meritless but not frivolous, we deny Verizon's motion for damages and costs pursuant to Rule 38.

Accordingly, we AFFIRM the judgment of the District Court and DENY appellee's Rule 38 motion.

APPENDIX A

FOR THE COURT,

Catherine O'Hagan Wolfe,
Clerk of Court

By _____

APPENDIX B

APPENDIX B: ORDER OF UNITED STATES DISTRICT COURT DATED JUNE 2, 2008

Case No. 01-B-15472 (SMB) 08 Civ. 2553 (GEL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC.,

Appellant,

-against-

VERIZON NEW YORK, INC.,

Appellee.

GERARD E. LYNCH, District Judge:

ORDER

On November 15, 2007, appellant Best Payphones

filed a notice of appeal from a November 5, 2007, order of Bankruptcy Judge Stuart M. Bernstein. On March 14, 2008, this notice of appeal was docketed in the Southern District of New York. Best was contacted by Court personnel on April 21, 2008, and notified that the appeal had been docketed, but has yet to file its brief. By motion dated April 25, 2008, appellee Verizon New York moves to dismiss Best's appeal. That motion will be granted.

Fed. R. Bankr. P. 8009(a)(1) states that "[t]he appellant shall serve and file a brief within 15 days after entry of appeal on the docket." More than six months have passed since Best filed its initial notice of appeal, more than seventy days have passed since entry of that appeal on this Court's docket, and more than thirty-five days have passed since Best's counsel was reminded of the docketing. Yet to date, Best has not filed an appeal, nor has it formally moved to extend its time to file such an appeal.[1]

Had Best filed a proper motion to extend time, it would nonetheless be denied. In other circumstances, this Court might have been more forgiving. In fact, in other circumstances, this Court has been more forgiving. In a related matter, by order dated November 3, 2005, this Court granted Best's motion to extend time to file its appeal from an order in the same

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[1] By letter dated April 23, 2008, Best requested that the Court "allow the parties until the end of next week to agree on a briefing schedule and submit it to the Court." (Letter of George M. Gilmer, Esq., to the Court, dated April 23, 2008.) However, no such briefing schedule materialized.

underlying bankruptcy matter. (No. 05 Civ. 653 1, Order of November 3, 2005.) The Court noted that Best filed its motion for an extension of time "close to three months after its brief was due," that the conduct of Best's counsel had been "sorely deficient," and that the extension was granted "[w]ith some hesitation." (*Id.*) Best has been reminded by this Court of the clear requirements of Rule 8009(a)(1), and its failure to abide by the rule a second time is neither explicable nor excusable.

Earlier this year, Best retained new counsel, who has represented Best in the underlying Bankruptcy matter at least as of February 3, 2008. In opposing Verizon's motion to dismiss the appeal, Best notes that, by virtue of certain mis-information from the Southern District of New York Bankruptcy Clerk's office, its new counsel did not initially receive notice of the docketing of its appeal. Best argues that the fifteen-day period of Rule 8009(a)(l) is only triggered once the appeal has been docketed and notice of the docketing has been sent to all parties. (Best Reply 3-4.) Even assuming this to be true, the fifteen-day period would have begun to run after Best's new counsel was notified of the docketing of the appeal – which occurred more than a month ago.

Finally, the "long and litigious" history of this proceeding needs to be taken into account. (No. 05 Civ. 653 1, Opinion and Order of March 14, 2006, at 17.) This litigation has been pending for more than five years and, as pointed out by Verizon, Best has repeatedly missed filing deadlines. The present appeal seeks review of the Bankruptcy Court's decision on a

narrow remand for specific factfindings (*id.*), a subject on which the standard of review is narrow and for which the preparation of a brief should not be difficult. In such circumstances, allowing yet more delay has little or no equitable appeal.

The docketing of this appeal, and the corresponding obligation to file a timely brief, can come as no surprise to Best, the party that filed the notice of appeal in the first place. Best has had more than six months to craft its brief and refine its arguments, and has only itself to blame for the failure to file a timely brief. Accordingly, it is hereby ORDERED that Verizon's motion to dismiss Best's appeal is granted.

SO ORDERED.

Dated: New York, New York
June 2, 2008

/s/
GERARD E. LYNCH
United States District Judge

APPENDIX C

APPENDIX C

APPENDIX C: ORDER OF UNITED STATES DISTRICT COURT DATED JULY 21, 2008

Case No. 01-B-15472 (SMB)
08 Civ. 2553 (GEL)

2008 U.S. Dist. LEXIS 108874

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC.,

Appellant,

-against-

VERIZON NEW YORK, INC.,

Appellee.

GERARD E. LYNCH, District Judge:

Appellant Best Payphones asks this Court to recon-

sider its order dated June 2, 2008, granting appellee Verizon New York's motion to dismiss Best's appeal due to Best's failure to comply with Fed. R. Bankr. P. 8009(a)(1), which requires that "[t]he appellant shall serve and file a brief within 15 days after entry of appeal on the docket." Best insists that the fifteen-day period does not begin to run until the appellant receives notice from "the district court clerk." Here, Best admits that its attorney of record "was contacted by the chambers of the Honorable Gerard E. Lynch on Monday April 2 1, 2008," and notified of the docketing of the appeal. (Best's Opposition to Verizon's Motion to Dismiss 2.) However, Best insists that this notice was insufficient, and claims that *Glatzer v. Enron (In re Enron Corp.)*, 475 F.3d 131 (2d Cir. 2007), prevents this Court from dismissing this appeal for failure to comply with Rule 8009.

In *Glatzer*, the district judge dismissed an appeal from an order of the bankruptcy court, viewing "the docketing of [an] appeal alone as sufficient to start Rule 8009's fifteen-day clock running." *Id.* at 132-33. The Second Circuit reversed, concluding that Rule 8009(a)(1) is "only triggered once the appeal has been docketed in the district court *and* notice of the docketing of the appeal has been sent to all parties." *Id.* at 134 (emphasis in original). In contrast to *Glatzer*, this Court did not "premise[ ] its decision to dismiss [Best's] appeal on the view that the docketing of the appeal was itself sufficient to start the fifteen-day clock." *Id.* at 134. Instead, this Court simply held that Best's deadline expired at least fifteen days after "notice [was] sent" to Best by a district court clerk regarding the docketing of the appeal. *Id.* at 134-35.

APPENDIX C

An appellant should not be punished for the mistakes of others outside of its knowledge and control, but this is not such a case. Best had actual notice of the docketing and still failed to file within fifteen days. On Best's theory, even now, more than eight months after Best filed its notice of appeal, more than four months after that appeal was docketed, and three months after receiving actual notice from court personnel, Best's fifteen-day clock still has not even begun. Rule 1001 of the Federal Rules of Bankruptcy Procedure instructs the Court to construe and administer those rules "to secure the just, speedy, and inexpensive determination of every case and proceeding." *Glatzer* does not mandate an interpretation of Rule 8009 as a rigid and unflexible [*sic*] as Best proposes. Best has only itself to blame for its failure to file a timely brief, and a contrary ruling would only reward Best for its dilatory tactics.

The Court has considered Best's other arguments, and they are without merit.

Accordingly, it is hereby ORDERED that Best's motion for reconsideration is denied.

SO ORDERED.

Dated: New York, New York
July 21, 2008

/s/
GERARD E. LYNCH
United States District Judge

APPENDIX D

APPENDIX D

APPENDIX D: ORDER OF THE SECOND CIRCUIT DATED JULY 31, 2009

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of July, two thousand and nine,

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IN RE: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC,

Appellant,

-v.-

VERIZON NEW YORK INC.,

Appellee.

ORDER

APPENDIX D

Docket Number: 08-4046-bk

[FILED JULY 31, 2009]

Best Payphones, Inc., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

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